Supreme Court, U.S.
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No. 99-1428

In The

Supreme Court of the United States

AARON WESTENDORP, ET AL.,

Petitioners,

v.

JESSE VENTURA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE EIGHTH CIRCUIT PROPERLY CONCLUDED THAT THE DISTRICT COURT WAS NOT CLEARLY ERRONEOUS IN FINDING THAT THE STATE ACTED TO CHANGE ITS POLICY AS A RESULT OF A UNITED STATES SUPREME COURT DECISION AND NOT AS A RESULT OF THIS LITIGATION.

2. WHETHER THE EIGHTH CIRCUIT WAS CORRECT, AS A MATTER OF LAW, IN CONCLUDING THAT PETITIONERS ARE NOT PREVAILING PARTIES.

3. WHETHER THE EIGHTH CIRCUIT PROPERLY FOUND THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING FEES BASED ON THE CONCLUSION THAT SPECIAL CIRCUMSTANCES MADE AN AWARD OF FEES UNJUST.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to this proceeding are:

Petitioners:

Joan Peter, Sarah Peter, a minor, by and through her parent and natural guardian Joan Peter; Krista Westendorp, Douglas Westendorp, and Aaron Westendorp, a minor by and through his parents and natural guardians Krista and Douglas Westendorp.

Respondents:

Christine Jax, Commissioner, Minnesota Department of Children, Families and Learning; Jesse Ventura, Governor, State of Minnesota.

The correct case caption for this matter is *Peter v. Jax*.

At the Eighth Circuit, the case caption for this matter is *Peter v. Jax*, 187 F.3d 829 (8th Cir. 1999). By changing the caption, Petitioners have created unnecessary confusion and erroneously implied a connection between this fees litigation (*Jax*) involving the State, and the school district merits litigation (*Westendorp v. I.S.D. # 273*, 35 F.Supp.2d 1134 (D. Minn. 1998)), where the State did not participate. Contrary to Petitioners' assertion, *Westendorp* is not the "merits decision" of this attorneys' fee matter. Because the State case was dismissed as moot, there is no merits decision in this case beyond the original district court decision. *See Peter v. Johnson*, 958 F.Supp. 1383 (D. Minn. 1997).

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, who were the State Defendants below, respectfully oppose Petitioners' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

The attorneys' fee opinion of the Court of Appeals (Pet. App. at 1-30), for which certiorari review is sought, is *Peter v. Jax*, 187 F.3d 829 (8th Cir. 1999) (*reh'g denied; reh'g en banc denied; reconsideration denied*) (order entered pursuant to Fed. R. Civ. P. 54(b)). The attorneys' fee opinion of the district court (Pet. App. at 31-92) is *Peter v. Wedl*, 18 F.Supp.2d 1002 (D. Minn. 1998).[1] The opinion of the district court (a decision denying Petitioners' motion for injunction and for summary judgment) (Pet. App. at 149-206) is *Peter v. Johnson*, 958 F.Supp. 1383 (D. Minn. 1997). *Johnson* is the only merits decision to which these Respondents were parties.

Petitioners separately litigated several issues with one of two school district defendants. The State was not a party to the litigation. The opinion of the Court of Appeals addressing the school district litigation (Pet. App. at 107-148) is *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998). The corresponding opinion of the district court after remand (Pet. App. at 93-106) is *Westendorp v. I.S.D. #273*, 35 F.Supp.2d 1134 (D. Minn. 1998).

STATEMENT OF THE CASE

On August 13, 1999, a unanimous panel of the Eighth Circuit affirmed the judgment of the district court

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[1] Robert Wedl and Bruce Johnson are former Commissioners of the Minnesota Department of Children, Families and Learning. Christine Jax, the current Commissioner, has since been substituted as the named defendant.

denying Petitioners' attorneys' fees request under 42 U.S.C. § 1988. Petitioners' counsel had sought $288,024 in fees, including over $75,000 incurred just to recover fees (not including any fees for the Eighth Circuit appeal). The Eighth Circuit held that Petitioners were not "prevailing parties" and, alternatively, even if they were, Petitioners were not entitled to fees because unique "special circumstances" made an award of fees unjust. Contrary to Petitioners' assertion, the court made no new law. Rather, the court affirmed the district court's factual findings as not clearly erroneous and applied the well-settled principles of *Farrar v. Hobby*, 506 U.S. 103 (1992) to those facts. On the alternative holding, the court found that the district court did not abuse its discretion, based on a multitude of factors, most of which are unchallenged by Petitioners. These intensely factual determinations and correct application of law do not merit review by this Court.

I. UNDERLYING LITIGATION

The facts of this case are set out in *Peter v. Jax*, 187 F.3d at 831-33 and 18 F.Supp.2d at 1002-1010 (Pet. App. at 7-12; 38-58). Although Petitioners direct the Court to the facts as discussed in *Peter v. Wedl*, 155 F.3d at 994-996 (Pet. App. at 114-119), Pet. at 3 (school district case), those "facts" have no relevance to this appeal. The State was neither a party nor involved in the appeal of the school district case. Because the issues and parties in *Peter v. Wedl*, 155 F.3d 992 (8th. Cir. 1998) (school district case) were different than those in *Peter v. Jax*, 18 F.Supp.2d 1002 (Pet. App. at 31) (attorneys' fees case), evidence relevant to the attorneys' fees issues was not part of the record in the school district case and critical arguments were not presented to the court. Furthermore,

Petitioners present multiple misstatements of fact, as well as mischaracterization of the opinions of the courts below. Therefore, Respondents provide the following full statement of the facts as found by the district court and affirmed by the court of appeals.

A. Original Cause Of Action

Petitioners Sarah Peter and Aaron Westendorp, as well as Choice in Education ("CIE"), sued two public school districts (Buffalo and Edina) and the State of Minnesota, seeking special education services at religious schools. They alleged that the denial of on-site services violated the Individuals with Disabilities in Education Act ("IDEA") 20 U.S.C. § 1400 *et seq.*; that the school districts discriminated against them based on religion; and that a State Rule required that discrimination.[2]

The State Rule at issue, Minn. R. 3525.1150, subp. 2 ("Rule"), is part of the State's funding mechanism under the IDEA. The State plays a limited role, relative to the school districts, in providing special education services under state and federal law. A student's public school district determines whether a student is eligible for special education services; a school district team, which includes teachers, parents and specialists, determines the appropriate program of services for the eligible student. *See* Minn. Stat. § 120.17, subd. 3a (implementing 34 C.F.R. Pt. 300); 34 C.F.R. § 300.121. If a parent chooses to send the student to a private school, religious or otherwise, the

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[2] Petitioners also brought a claim under the Religious Freedom Restoration Act ("RFRA"), which they dismissed after RFRA was declared unconstitutional. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

public school need not offer the same services to the student. 34 C.F.R. §§ 300.451-300.452. The school district must make services available on an equitable basis to private school students, but the location of the services is left to the school district's discretion. *See Peter v. Wedl*, 155 F.3d at 998 (Pet. App. at 27).

The State is responsible for establishing an overall plan to assure the federal government that special education services will be provided as required by federal law and provides approximately 40% of the costs of the program. The Rule then at issue paid state aid to public school districts for non-instructional special education services given at "neutral sites," such as public schools and nonsectarian private schools (*see* Minn. Stat. § 123.932, subd. 9). A school district would not have received state aid for services located at religious schools, but might have received aid for services at nonsectarian schools if otherwise permitted under the law.[3] However, contrary to the representation of Petitioners at 2, the Rule did not require that the services be provided at a nonsectarian, private school. In fact, the location of services was a matter of choice of the school district. Further, the Rule did not affect the students' ability to receive special education services. Thus, throughout the litigation, the school districts provided Peter and Westendorp the full range of special education services. The Rule, at most, may have influenced the school districts' choice of location of services.

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[3] As discussed below, on October 13, 1997, the Minnesota State Board of Education amended the Rule to include all private schools as possible sites for non-instructional services.

The lawsuit alleged that the Rule discriminated against individuals who chose to attend private religious schools because they were denied publicly provided services at religious school sites. On the merits of the claim, the State maintained that the Rule did not require school districts to discriminate and that, according to the school districts' sworn affidavits, the districts did not, in fact, discriminate. The school districts maintained that the denial of services on-site was based on longstanding school district polices of not providing on-site services to *any private school students*, regardless of whether they attended religious or nonsectarian private schools. Additionally, the State maintained that the Rule was constitutional as applied because the services at issue – in-class public school teacher aides – could not be provided at religious school sites under the United States Supreme Court decision in *Aguilar v. Felton*, 473 U.S. 402 (1985).[4]

B. Procedural History.

The case was filed in July 1996. Shortly thereafter, Petitioners sought an order requiring defendants to provide Peter and Westendorp with special education services at religious schools during the 1996-97 school year. This preliminary injunction was denied by the Honorable David S. Doty, Judge of Federal District Court, on August 6, 1996, as was a request for expedited consideration. The State and school district defendants moved to dismiss the action on various grounds and Peter and Westendorp sought summary judgment on their statutory claims

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[4] Overruled by *Agostini v. Felton*, 521 U.S. 203 (1997).

under the IDEA. The motions were argued on November 8, 1996.

The State and school district defendants sought to stay discovery and consequent expenses while the motions were pending. Because Petitioners' counsel refused to voluntarily delay discovery, defendants obtained a protective order to stay discovery. Thus, no discovery was conducted during the four months that the motion was pending.

C. Decision Of Judge Doty.

On March 26, 1997, the court dismissed plaintiffs' IDEA claim, thus eliminating their statutory claim for services at religious schools sites. *See Peter v. Johnson*, 958 F.Supp. 1383, 1400 (D. Minn. 1997) (Pet. App. at 149).[5] Further, the court dismissed all claims against the State for money damages. The court dismissed the organizational plaintiff (CIE), thereby limiting the action to the two individuals (Peter and Westendorp). *See id.* at 1391 (Pet. App. at 176). The court denied defendants' motions to dismiss the constitutional issues, finding that the pleadings on their face stated a cause of action. *See id.* at 1394 (Pet. App. at 185).

The court denied Petitioners' motion for injunctive relief, refusing to order defendants to provide on-site services at religious schools. The court concluded that, even if the Petitioners were to prevail on their constitutional and federal claims, the court would likely prohibit

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[5] *Rev'd in part sub nom., Peter v. Wedl*, 155 F.3d 992 (1998) (Pet. App. at 107-148).

on-site paraprofessional services to any student voluntarily attending any private school, religious or non-religious, thereby denying the Petitioners the relief they were seeking. *See id.* at 1401 (Pet. App. at 205).[6]

Contrary to the assertion of Petitioners' counsel, (Pet. App. at 16), the district court never ruled on the Establishment Clause defense because such a ruling was not required. Although the State asserted that defense on the IDEA claim, no ruling was needed because the court ruled the IDEA did not require the services.

D. Settlement Of Case Against The State.

On June 23, 1997, this Court decided *Agostini v. Felton*, 521 U.S. 203 (1997). *Agostini* specifically overruled *Aguilar*, holding that placing public school teachers on religious school sites does not per se violate the Constitution. 521 U.S. at 236. *The next day*, counsel for the State wrote to Petitioners' counsel to inform him that the Commissioner was reviewing the State Rule in light of *Agostini* and asked that no additional work be performed for *three days* pending that review. (Pet. App. at 210-211.) On the second day, June 26, 1997, Petitioners' counsel rushed to file a new injunction motion. Also on June 26, the State informed Petitioners' counsel that the Commissioner would not enforce the Rule against the school districts if the districts chose to provide Peter or Westendorp the services on site at a religious school and that the Commissioner would ask the State Board of Education to amend any portion of the Rule inconsistent with *Agostini*. (Pet. App. at 216.)

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[6] This conclusion was never reversed.

The State's position, set forth in a letter from the State's counsel on June 26, 1997, was reiterated in letters of July 11 (Pet. App. at 229) and July 22 (Resp. App. at 1). The State's decision about the Rule was made without condition and without regard to the litigation, other than to iterate that the case was now moot as to the State. At the time of the Commissioner's decision, the overall validity of the Rule was beyond the scope of the litigation. The only issue remaining in the litigation was the application of the Rule to the two individual appellants. The State's decision on the Rule did not guarantee services at religious schools to the two Petitioners; that determination was left to the school districts' discretion. The Petitioners and the State signed a stipulation on July 31, 1997, memorializing the State's position. (Pet. App. at 244.) On August 4, 1997, the district court adopted the parties' stipulation and issued an order as proposed by the parties. (Pet. App. at 250, 253.) The court did not review the merits of the claim in any way and made no finding that the State Rule violated the Constitution. The stipulated order did not require the State to change the Rule. The State Board of Education, which had sole authority to amend the Rule, was not a party to the litigation. The stipulated injunction merely maintained the status quo until the Board reviewed the Rule. On October 13, 1997, the State Board of Education formally changed the Rule to permit what *Agostini* allowed. The parties filed a stipulation dismissing the case as moot on September 22, 1998. (Resp. App. at 3.)

The stipulation specifically left open Petitioners' argument for attorneys' fees.

II. PETITIONERS' CONTINUING LITIGATION AGAINST THE SCHOOL DISTRICTS.

The change in the State's position did not guarantee that Sarah Peter or Aaron Westendorp would receive special educational services at a religious school. The location of these services remained a decision of the local school district.

A. Settlement With Sara Peter.

In Sarah Peter's case, the school district decided to provide the services at a religious school and settled her claim. (Pet. App. at 256.) The school district also paid Sarah Peter $1,000 and Petitioners' counsel $30,000. The settlement agreement noted that it was based in part on the State's announced change of policy in July 1997. It did not mention the injunction, which was entered in August 1997.

B. Litigation With Aaron Westendorp.

In Aaron Westendorp's case, the Edina School District continued to litigate. The School District, under its announced policy of not providing services on site at *any private school*, would not provide services to Aaron Westendorp at a religious school, so he continued his claim.

The districts' position was unaffected by the State's post-*Agostini* policy. On appeal, the Eighth Circuit reversed the district court's entry of summary judgment on behalf of the school district. *See Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (Pet. App. at 107) ("*Westendorp*

Appeal").[7] The circuit court held that, under the amended IDEA, effective June 4, 1997, the school district had no ongoing obligation to provide services at private schools sites; however, the school district (not the State) improperly denied services to Westendorp at his private school before that date. Westendorp was awarded $1 in damages and, on remand, the court ordered special education services at a religious school site, as equitable relief for the past violation of IDEA. Petitioners have a pending attorneys' fees claim against the Edina School District, which includes over $67,000 in fees for its appeal.

The court did not rule that the district discriminated on the basis of religion. Rather, the court ordered a trial on the religious discrimination issue as a question of fact. That matter was left to the district court on remand, which did not decide the issue because Westendorp received full relief under his federal statutory claim.

III. ATTORNEYS' FEE LITIGATION.

After the stipulation with the State was entered, the State and Petitioners discussed attorneys' fees. Because the parties could not settle the issue, the matter was

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[7] The State was not a party to the *Westendorp Appeal*. Arguments and facts critical to understanding the effect of the Rule were not presented to the court. In the fee-litigation involving the State, the State provided the district court with evidence not presented to the Court of Appeals in the *Westendorp Appeal*. Any criticism in the *Westendorp* case was directed at the school district, not the State. Thus, reliance on any dicta in *Westendorp* is unfair to the State, as well as irrelevant to the petition. Significantly, the *Jax* panel included two judges from the *Westendorp* panel; these judges were part of the unanimous opinion affirming the denial of attorneys' fees.

presented to Magistrate Judge John M. Mason. Petitioners were seeking over $210,000 for the merits litigation and $75,000 for the time spent litigating fees.

A. Decision Of District Court Magistrate Judge Mason.

Judge Mason issued his order denying fees on August 12, 1998. *See Peter v. Wedl*, 18 F.Supp.2d 1002 (D. Minn. 1998) (Pet. App. at 31). In reaching his decision, Judge Mason reviewed the extensive submissions of the Petitioners:

> We are satisfied that the substantial submissions by the parties were sufficient and complete. "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). *See also Associated Builders v. Orleans Parish*, 919 F.2d 374 at 377, 378 (5th Cir. 1990). Plaintiffs were permitted to submit Memoranda in support of their Motion which exceeded page limitations. In addition, their Memoranda contained lengthy single space footnotes, and incorporated by reference many other materials, including more than 75 pages of single spaced correspondence containing legal argument. Plaintiffs' supporting materials included three three-ring binders filled with Affidavits and Exhibits, supplemented by additional Affidavits filed with their Reply. A summary of the contents of the three-ring binders is in the form of a nine page "Annotated Exhibit List to Fee Application." This Court denied Defendants' Motion to strike Plaintiffs' filings, and fully considered all of the materials submitted.

Peter v. Wedl, 18 F.Supp.2d at 1010 (Pet. App. at 57).

Based on his comprehensive review of this substantial record, Judge Mason issued a 37-page opinion, with detailed factual review and findings. *Id.* at 1004-10 (Pet. App. at 38-55). The court reviewed the case chronology, especially the actions of the State before and after the *Agostini* decision: "The chronology supports the conclusion that the [State's] action . . . was taken as a result of the decision of the Supreme Court in *Agostini*, and not as a result of Plaintiffs' lawsuit." *Id.* at 1017 (Pet. App. at 78). Looking at the entire record, the court rejected the idea that the discovery against the State – the single deposition taken by Petitioners in the case against the State – or the Petitioners' precipitous injunction motion had any effect on the State in changing its policy. *See id.* at 1017-18 (Pet. App. at 80).

Based on this intensely factual inquiry, the court determined that there was no causal link between the lawsuit and the State's decision to provide funding for services at religious schools under Minn. R. 3525.1150, subp. 2. *See id.* at 1016 (Pet. App. at 75). The court concluded that Petitioners were not prevailing parties and, therefore, not eligible for fees. *See id.* at 1017 (Pet. App. at 78). As separate and independent grounds for denying fees, the court concluded that special circumstances made an award of fees unjust in this case. *See id.* at 1018 (Pet. App. at 83).

B. Decision Of Eighth Circuit Court Of Appeals.

1. Petitioners are not prevailing parties.

The primary holding below was that Petitioners were not prevailing parties under 42 U.S.C. § 1988. In reaching

this conclusion, the court applied the correct legal standard for determining "prevailing party" status under *Farrar v. Hobby*, 506 U.S. 103 (1992). (Pet. App. at 12-13.) Applying *Farrar*, the court required Petitioners to show that the relief obtained in this case "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." (Pet. App. 13.) The circuit court here rejected Petitioners' claim that the mere presence of the temporary consent injunction and stipulation automatically made them prevailing parties. *Id. See Rhodes v. Stewart*, 488 U.S. 1, 3 (1988) (declaratory judgment does not automatically make plaintiff prevailing party).

The court affirmed the finding that, because of *Agostini*, after June 26, 1997, the Commissioner no longer considered the religious/nonreligious nature of the site of service in providing state aid to public schools. The stipulation merely reiterated this change in policy, which was already in effect. The stipulation and injunction did not require any change in the State Rule; the State Board of Education was not a party and not subject to the injunction. Further, the stipulation and injunction did not require the State or any other party to provide services to either Petitioner. The injunction was not a consent judgment nor did it create a permanent injunction; rather, the injunction lasted until the State Board of Education, which was not subject to the injunction, considered changes to the Rule. Because the Board modified the Rule for reasons unrelated to this lawsuit, the claims became moot and the case was dismissed. Under these facts, which the circuit court found to be not clearly erroneous, the court concluded that the litigation did not cause the State to change its policy and that neither the stipulation

nor the temporary injunction materially altered the legal relationship between the State and the Petitioners nor caused any change in the State's behavior towards Petitioners.[8] Thus, Petitioners were not "prevailing parties" under the law.

2. Special circumstances justified denial of fees.

The court held that even if Petitioners prevailed, the district court did not abuse its discretion in denying fees because of "special circumstances." The court acknowledged that prevailing parties "should ordinarily recover an attorney's fees" and that denial for special circumstances should be narrowly construed. (Pet. App. at 23.) The court noted that "the defendant's good faith alone is not a special circumstance sufficient to justify a denial of fees." *Id.* The court concluded, however, that several factors, taken together, amounted to special circumstances making an award of fees unjust.

First, the court considered that, until *Agostini*, the State had a constitutional duty to follow *Aguilar.* Just like a court, the Commissioner must follow Supreme Court precedent until it is overturned. (Pet. App. at 24.) The

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[8] The State also argued that the stipulation and injunction did not directly benefit either Petitioner: (1) Westendorp received no relief until the court ordered Edina to provide services, 18 months after the Rule change and six months after the case against the State was dismissed; (2) Peter's relief was based on the policy change that occurred before the stipulation was entered. *Farrar, supra,* 506 U.S. at 111 (relief "must directly benefit [plaintiff] at the time of the judgment or settlement"). The panel did not decide the issue, but indicated support for the State's position. (Pet. App. at 30, fn. 7) (This issue would have to be decided on remand if the Court were to grant review and reverse the judgment.)

Commissioner also had a legal duty to enforce the State Rule until it was changed, if there was a constitutional basis for the Rule.[9] This is not an "intervening favorable caselaw" exception as Petitioners contend. Rather, this is a unique circumstance, where the Supreme Court reverses the long-standing precedent that formed the premise of the State Rule. Further, the *Jax* opinion does not rely on this factor alone, but considers it in combination with the remaining factors.

Next, the court considered the conduct of Petitioners' counsel in "running up the meter." (Pet. App. at 24-25.) The court did not in fact hold that counsel should not vigorously pursue meritorious claims in violation of ethical standards. Rather, the court considered the claim for fees and concluded that counsel had exceeded normal standards of advocacy. By March 26, 1997, when the district court lifted the stay of discovery, counsel knew that *Agostini* was forthcoming, well before the start of the school year; yet counsel claims $50,000 on the merits for the period between the Supreme Court argument in *Agostini* and the *Agostini* decision.[10] More remarkably, counsel claims over $50,000 in the five weeks between the *Agostini* decision and the date of the stipulation. *Jax* noted that the State asked for a three-day hiatus following *Agostini*. Rather than waiting, Petitioners filed a new motion based on *Agostini* within two days. The court further found that Petitioners used the prospect of additional fees to make more demands and offered to "stop

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[9] Petitioners never approached the Board seeking to change the Rule.

[10] Having conducted one deposition against the State during that period.

the meter on fees" only if the State agreed to their unreasonable demands. (Pet. App. at 26.) Denying the requested fees, the court concluded that a party "is not entitled needlessly to accumulate exorbitant legal fees . . . ." (*Id.*)

The court also made special note of the fact that Petitioners hired a self-described "fee-litigation specialist," who was claiming $75,000 just to litigate the fee recovery, plus fees for the appeal if successful. (Pet. App. at 26.) The court concluded that these fees were excessive and that Petitioners had ignored this Court's admonition that "a request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Finally, the court noted that special circumstances existed because the State reasonably believed its action was compelled by law and that another defendant, with a much more direct connection to any constitutional violations, could fully compensate Petitioners for attorneys' fees. (Pet. App. at 27-30.) (relying on *Rose v. State of Nebraska*, 748 F.2d 1258, 1264 (9th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985)); *see also Little Rock Sch. Dist. v. Arkansas State Board of Educ.*, 928 F.2d 248 (8th Cir. 1991) (fees denied because plaintiffs "well compensated" by fees from other parties). This is consistent with caselaw that apportioning fee liability is a matter of discretion with the district court – whether a defendant is jointly and severally liable, proportionally liable, or excused from liability.

The court concluded that the school districts had primary responsibility for any violation of special education law or the Constitution. Consistent with *Wedl*, the *Jax* Court concluded that the school district – not the State –

failed to provide the required services, which was the relief Petitioners sought. This relief was independent of the State Rule, as demonstrated by the litigation between Aaron Westendorp and Edina, which continued for almost two years after the State changed its Rule. In the end, the relief provided by Edina on the IDEA claim "provided all the relief they have sought in this case." Without dispute, the two school districts are capable of providing a fully compensatory fee.[11] The Court noted that Petitioners already received $30,000 from the Buffalo School District and that a petition for attorneys' fees against Edina is pending in district court.

Thus, the Eighth Circuit thoroughly examined the extensive factual record and concluded that the district court had not abused its discretion in holding that a number of factors, taken together, amounted to special circumstances making an award of fees unjust. In sum, these factors included: (1) the State's duty to follow long-standing Supreme Court precedent until it was reversed; (2) Petitioners' counsel "running up the meter," exceeding normal standards of advocacy; (3) Petitioners' offering to "stop the meter on fees" only if the State agreed to unreasonable demands; (4) Petitioners' use of a self-described "fee-litigation specialist," spawning a second major litigation over fees; and (5) the presence of another defendant with a much more direct connection to any constitutional violation who could fully compensate Petitioners. This alternative holding is especially unique to

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[11] The pending fee petition against Edina includes a request for over $67,000 for the *Wedl* appeal, as well as fees against Edina for the same district court action in which they were claiming fees against the State.

the facts of this case and provides an independent basis for denying fees. This decision does not create an "intervening favorable caselaw" exception to 42 U.S.C. § 1988 or any conflict with a lawyer's duty under the Rules of Professional Responsibility. The Eighth Circuit decision, based on a careful review of the record, does not merit Supreme Court review.

REASONS FOR DENYING THE PETITION

There is no reason for the Court to grant review in this case. The petition should be denied because (1) the case does not create an "intervening favorable" caselaw exception to Section 1988; (2) the circuit court applied the correct legal standard under *Farrar* to the facts; and (3) the case does not meet the high standards required for Supreme Court review. The case involves an intensely factual inquiry and correctly applies well-settled law to those facts. Further, the decision is not in conflict, direct or otherwise, with prior decisions of the Supreme Court or other circuits. Thus, the petition should be denied.

I. THERE IS NO INCONSISTENCY AMONG THE CIRCUITS.

Petitioners cite various cases to argue inconsistency among the circuits. As shown below, the cases do not support Petitioners' position and, in fact, demonstrate that different decisions in the circuits are due to the different facts in the cases. Consistently, the circuits look to the specific facts in deciding these fee cases.

A. The Eighth Circuit's Decision Is Consistent With The Fifth Circuit's Decision In *Associated Builders.*

Like the Eighth Circuit, the Fifth Circuit, in *Associated Builders & Contractors v. Orleans Parish School Board*, 919 F.2d 374 (5th Cir. 1990), examined the facts to determine whether plaintiffs were prevailing parties. The most impressive fact noted by the Fifth Circuit was the defendants' *admission* that the challenged program was changed because of the litigation:

> [T]he school board's own resolution provided a convincing admission that the litigation played a role on prompting the repeal of the program: "[I]t is in the best interest of Orleans Parish School Board to repeal the existing program . . . in light of pending litigation. . . . "

Associated Builders, 919 F.2d 374 at 378. Furthermore, the Fifth Circuit repeatedly noted that the chronology was key to its holding:

> The district court found the lawsuit was a substantial factor in the school board's decision to repeal its set-aside program. The court correctly considered the chronology of events and explained its reasoning. (Citations omitted.) *Id.* at 378.
>
> As we have previously observed, the chronology of events is an important consideration. . . . (Citations omitted.) *Id.*
>
> In deciding whether the litigation was a significant catalyst in prompting the board's action, the district court conducted an "intensely factual" inquiry. (Emphasis in original, citations omitted.) We cannot set aside its conclusion unless the evidence leaves us with the firm conclusion that the court has made a mistake. (Citations omitted.) In light of the court's careful

> analysis of the chronology of events and the board's admission that the lawsuit influenced its conduct, the conclusion is not clearly erroneous. *Id.*

Similarly, in the present matter, the Eighth Circuit relied on the district court's chronology:

> In this case, the district court's finding that the State changed its position on enforcement of the rule because of *Agostini*, and not because of appellants' lawsuit, is supported by the record and not clearly erroneous.

Jax, 187 F.3d at 834 (Pet. App. at 16).

> The chronology amply supports the district court's finding that it was *Agostini*, not the litigation, that caused the State to change its position on enforcement of the rule.

Id. at 835 (Pet. App. at 16).

Thus, the Eighth and Fifth Circuits applied the same legal principles, and both affirmed the respective factual findings of the district court as not clearly erroneous. The courts reached different results only because they applied the principles to different sets of facts and findings.

B. The Eighth Circuit's Decision Is Consistent With The Sixth Circuit's Decisions In *Perket* And *Putnam*.

The Sixth Circuit's decision in *Perket v. Secretary, Health and Human Services*, 905 F.2d 129 (6th Cir. 1990) was also closely tied to unique facts. While *Perket* was pending, the Sixth Circuit established controlling caselaw favoring the plaintiff (*Haynes v. Secretary of Health and Human Services*, 734 F.2d 284 (6th Cir. 1984)). The *Perket* plaintiff moved for summary judgment under *Haynes*. Rather than following the controlling caselaw, the *Perket*

defendants ignored the new law and brought a cross motion for summary judgment. While the cross motion was pending, Congress passed a law largely consistent with the Sixth Circuit's controlling precedent. Then and only then did the *Perket* defendants change their position. On review the Sixth Circuit noted: " . . . the Secretary's non-acquiescence to this court's holding in *Haynes* figured critically in the district court's award of attorney's fees to Perket." *Perket*, 905 F.2d at 131. Here, Respondents immediately changed policy consistent with the new law. As noted above, that change did not provide Petitioners the relief they sought.[12] *See* discussion *supra* at 9-10.

Petitioners also cite *Putnam v. Davies*, 960 F.Supp. 1268 (S.D. Ohio 1997), *aff'd*, 149 F.3d 1184 (6th Cir. 1998) (*op. unpub.*) to show that the Sixth Circuit rejects the argument that an intervening decision deprives a plaintiff of prevailing party status under Section 1988. *Putnam* does not support Petitioners' argument. The intervening decision in *Putnam*, an Ohio Supreme Court ruling that a particular state statute was unconstitutional, was not binding on the federal district court looking at a related, but *different*, statute. The federal court could have reached a contrary result on the specific statute contested before it. Therefore, it was not an intervening decision that

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[12] This case is also distinguishable under the so-called inevitability theory. In *Perket*, the court concluded that, because there were no facts to support the decision denying disability benefits, it was inevitable that Perket would prevail. *Perket*, 905 F.2d at 133. Here, Petitioners' prevailing status was not "inevitable." *See KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999) (failure to provide services on site at religious school does not deny free exercise rights or equal protection of students). *See also* discussion *infra* at 22 n.13, 26-28.

conveyed prevailing party status upon the *Putnam* plaintiff; rather, the prevailing party status was a result of the federal district court's ruling in *Putnam* itself that the statute challenged in federal court was unconstitutional. In contrast, neither the Eighth Circuit nor the district court in the present matter ever ruled on the constitutionality of the underlying State Rule.[13]

More importantly, *Jax* does not hold that an intervening favorable decision deprives a party of prevailing party status. Rather, the court considered the effect of *Agostini* on the conduct of the defendants. The court considered the entire record and rejected the assertion that the State was using the "cover" of *Agostini* to avoid attorney fee liability. Instead, the court found that, in this case, the facts established that the defendants changed their conduct as a result of the decision and *not* as a result of the litigation and entered a consent order that temporarily maintained the status quo. On these facts, Petitioners did not establish prevailing party status under *Farrar*.

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[13] Further, to the extent Sixth Circuit created an alternative "inevitability theory," the instant case is not the vehicle for resolving any possible conflict among the circuits. *Compare Guglietti v. Secretary of Health and Human Services*, 900 F.2d 397, 402-03 (lst Cir. 1990) (rejecting theory as spawning major hypothetical relitigation of cases in fee dispute). In the instant case, there was no finding of inevitability and such a determination would require significant litigation of constitutional and factual issues, which the remand in the *Westendorp Appeal* showed, are unnecessary for Petitioners to obtain full relief.

C. The Eighth Circuit's Decision Is Consistent With Arkansas Community Organization (ACORN).

The *Jax* decision is consistent with *ACORN's* conclusion that "good faith" does not justify denial of fees despite the unsettled state of the law in the area. Pet. at 24. *See Arkansas Community Organization for Reform Now v. State Bd. of Optometry*, 468 F.Supp. 1254, 1257 (E.D. Ark. 1979) (three-judge court). Both the circuit and district courts in *Jax* acknowledged that the "good faith" of the defendants may not be used to deny an award of attorneys' fees. (Pet. App. at 23, 88.) Instead, the Eighth Circuit examined the totality of the facts to support its holding of special circumstances. The Court listed five separate factual bases (including duty to follow Supreme Court precedent) that, when taken together, justified the denial of fees. *See Jax*, 187 F.3d at 837, 839 (Pet. App. at 23-30). Thus, the Eighth Circuit itself found no conflict.[14]

A recent decision in the Eighth Circuit demonstrates that the circuit is not creating a good faith exception to Section 1988 liability. One month after *Jax*, while the *Jax* petition for rehearing was pending, the court decided *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999). In affirming an award of fees, *Carhart* stated that a defendant's good faith belief that its action was constitutional is not in itself a special circumstance justifying a denial of fees. The panel in *Jax* operated on the same premise. 187 F.3d at 837. *Carhart* concluded that the district court did not

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[14] *ACORN* also can be distinguished on a key fact. ACORN was a prevailing party because the court declared the statute at issue unconstitutional. In contrast, Petitioners sought to have the State rule declared unconstitutional but never obtained such a decision.

abuse its discretion in holding a particular defendant liable for fees. Likewise, *Jax* concluded that the district court did not abuse its discretion, in part because defendant school districts had primary responsibility for any violation of special education law or the Constitution and are capable of providing a fully compensatory fee. Thus, *Jax* and *Carhart* applied the same legal principles – discretion to apportion liability – but reached different results as they applied the principles to different sets of facts.

D. *Laidlaw* Has No Effect On The Outcome Of This Case.

Citing *Friends of the Earth v. Laidlaw Environmental Services*, ___ U.S. ___, 120 S.Ct. 693, 711-12 (2000), Petitioners assert that the "catalyst" theory of attorney fee entitlement under 42 U.S.C. § 1988 may not remain viable following *Farrar v. Hobby*, 506 U.S. 103 (1992). Regardless, *Jax* does not conflict with *Laidlaw*, because the Eighth Circuit applied *Farrar*, not the catalyst theory. *Laidlaw* in fact neither expressly endorsed nor repudiated the continuing validity of the catalyst theory. 120 S.Ct. at 711. Thus, there is no need for Supreme Court action here.

Furthermore, the court should not take this case to address the viability of the catalyst theory because the result will not change, whether the theory remains viable or not. If the catalyst theory no longer exists, the State prevails under *Farrar*. Likewise, if the catalyst theory remains viable, the State will still win because of the "causation" finding of the courts below and because of the "special circumstances" findings of the district court, which the Eighth Circuit found to be supported by the evidence and not an abuse of discretion. In either case, the State will prevail.

E. Harmony, Not Cacophony, In The Circuits.

The lower courts are not in conflict over the effect of intervening favorable precedent on a plaintiff's status as a prevailing party under the fees statute. As demonstrated, *supra*, any differing results in the cases cited by Petitioners are due to application of the law to different underlying facts. Most importantly, this case does not hold that an intervening favorable precedent deprives Petitioners of prevailing party status. There is no conflict that merits attention by this Court and the Petition for Writ of Certiorari should be denied.

II. The *Harper* Retroactivity Analysis Has No Relevance To This Case.

Petitioners assert that the Eighth Circuit's holding directly conflicts with this Court's retroactivity analysis in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993). Pet. at 14. This argument is a red herring.

The Eighth Circuit's decision here does not implicate *Harper*. *Harper* held:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 98. The relevant rule of federal law here under discussion is the holding in *Agostini v. Felton*, 521 U.S. 203 (1997), overruling *Aguilar v. Felton*, 473 U.S. 402 (1985). There is no question that the lower courts in the present

case applied *Agostini* retroactively. Applying *Agostini* retroactively, however, does not create entitlement to attorneys' fees for Petitioners.

Agostini is not an attorneys' fees case and, therefore, has no effect on the legal standards for considering fee claims. Petitioners, however, attempt to use *Agostini* through *Harper* as a back door to establish entitlement to fees under the "inevitability of victory" theory. Petitioners argue, in effect, that if there is intervening favorable caselaw, they are automatically entitled to fees regardless of whether they meet the standards for fees under *Farrar*.[15] This Court has never articulated such a theory and, as previously argued, this is not the case to consider a such major expansion of attorney fee liability. *See supra* at 21 n.12, 22 n.13.

Even if *Harper* has any relevance, retroactive application of *Agostini* does not resolve the merits of Petitioners' claim for attorneys' fees. As Petitioners concede:

> *Agostini* did not involve any affirmative action claim under the Free Speech or Free Exercise clauses challenging denial of services to children attending religious schools. The only question decided was whether the Establishment Clause required denial of such services.

Pet. at 7.

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[15] The questions of whether *Agostini* "changed the law" is not relevant to the fee decision. The circuit court did not use this "change in law" to deny fees as a matter of law. Rather, the court considered the State's position in light of *Agostini* as a factual matter in determining the impact of this litigation on the conduct of the State and as a special circumstance in apportioning liability relative to the two school district defendants.

Agostini decided only that the First Amendment Establishment Clause did not per se preclude placing publicly-paid teachers on religious school sites. *Agostini* did not, however, address the Petitioners' central claims – whether the State and its public school districts were constitutionality *required* under the First Amendment Free Exercise Clause to provide publicly-paid teachers at their religious schools. Further, *Agostini* did not decide the unresolved factual issue of whether the Rule caused the school districts to deny services to the Petitioners. The State amended its Rule to provide funding to districts that took advantage of the ruling in *Agostini;* that change did not address the Petitioners' constitutional claim, nor did it require the school districts to provide publicly-paid teachers at the Petitioners' religious schools.

The constitutionality of the underlying State Rule in *Jax* has never been decided.[16] The only issue for the court

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[16] Petitioners misrepresent the case below, in stating:

> Petitioners' § 1983 suit challenged state conduct as not being in conformity with the correct understanding of the Constitution. Petitioners' claims on the merits were sustained in this regard, first by the District Court (as against a motion to dismiss), 958 F.Supp. at 1394-95 (Pet. App. at 186-87), and then by the Eighth Circuit. 155 F.3d at 996-998 (Pet. App. at 120-26). Petitioners defeated the State's defense of its rule and obtained an injunction against its enforcement. In short, Petitioners *won*. That is all that matters.

Pet. at 16 (emphasis in original). Petitioners never in fact "defeated" the State's defense. The constitutionality of the State's rule has never been decided, pre- or post-*Agostini*. Petitioners' claims were hardly "sustained" by surviving a motion to dismiss, which was not based on consideration of the constitutionality of the Rule. Moreover, the Eighth Circuit

in *Jax* was whether Petitioners were entitled to attorneys' fees based on the factual record in this case. As previously discussed, the circuit court correctly applied the *Farrar* standards to determine that Petitioners were not prevailing parties.

Moreover, the Eighth Circuit held against Petitioners' demand for attorneys' fees on a second, independent basis. Even if Petitioners were prevailing parties, the totality of the circumstances – the court enumerated five – justified the denial of attorneys' fees. *Jax*, 187 F.3d at 837-839 (Pet. App. at 23-30). The bulk of the "special circumstances" relates directly to the actions of Petitioners' counsel in conducting this litigation, as well as to the availability and culpability of two other defendants. This is an independent justification for affirming the denial of attorneys' fees.

III. The Eighth Circuit's Opinion Does Not Conflict With Ethical Rules And Professional Responsibilities Binding On Attorneys In 42 U.S.C. § 1983 Litigation.

The circuit court did not hold that counsel should not vigorously pursue meritorious claims in violation of ethical standards. Rather, as previously discussed, the court concluded that counsel exceeded normal standards of advocacy. *See supra* at 14-16. Counsel used the *Agostini* decision to accumulate over $50,000 for the five-week

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"merits" decision Petitioners cite for proof that they won is, in fact, dicta in their case against the Edina school district *to which the State was not a party*. In addition, as discussed *supra*, the State Rule was only the funding mechanism; it did not require denial of services. The school districts decided where services would be provided.

period after State determined it would no longer enforce the State Rule; counsel increased its demands and offered to "stop the meter on fees" only if the State agreed to its unreasonable demands. *Jax*, 197 F.3d at 838 (Pet. App. at 26); and counsel hired a "so-called fee-litigation specialist," who is claiming $75,000 just to litigate the fee recovery, plus fees for the appeal if successful. *Id.* The court concluded that these fees were excessive and that Petitioners had ignored the Supreme Court's admonition that "a request for attorney's fees should not result in a second major litigation." *Id.*

Under the totality of these circumstances, the Court of Appeals properly held that the district court did not abuse its discretion in denying fees to Petitioners. The decision provides ample latitude for an attorney to vigorously pursue meritorious claims consistent with an attorney's ethical duties without exceeding the acceptable standards of advocacy.

CONCLUSION

This case involves an intensely factual inquiry and correctly applied well-settled law to those facts. The decision is not in conflict with prior decisions of the Supreme Court or other circuits. The petition should be denied.

Respectfully submitted,

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